JUN 23 1983

No. 82-1904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHERYL SUE WATSON, *ET AL.*,

Petitioner,

v.

JOE BARTLETT, *ET AL.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INSURANCE COMPANY

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JOE BARTLETT, JR., M. BOLIVAR BISHOP, THE NORTH RIVER INSURANCE COMPANY AND INTERNATIONAL SURPLUS LINES INSURANCE COMPANY oppose the petition of Cheryl Sue Watson, *et al.*, for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered February 22, 1983.

JURISDICTION

This Court has at least inferentially dealt with the question raised by petitioner and the issue should be considered settled by this Court, as well as by our Constitution; consequently, petitioner does not meet the tests of U.S. Sup. Ct. Rule 17.1.(c), 28 U.S.C., and these respondents object to jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides in pertinent part:

> "(T)he right of trial by jury should be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 50 of the Federal Rules of Civil Procedure, 28 U.S.C. provides in pertinent part:

> "(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

> "(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict: . . ."

STATEMENT OF THE CASE

In keeping with U.S. Sup. Ct. Rule 34.2., 28 U.S.C., these respondents show that Mr. Talbot Watson, who was employed by Vancouver Plywood Co., Inc. ("Vancouver"), on November 15, 1978, signed a consent form and submitted to a polygraph examination by Chief Deputy Sheriff Joe Bartlett, Jr. which was administered as part of a criminal investigation of a third person who had been arrested for, and who was subsequently convicted of, theft of Vancouver's timber since that third person had implicated Mr. Watson and others. (A. 11, 14 and 15) During that examination Mr. Watson was evasive but made certain admissions of business irregularities which affected his employer. (A. 11-12) As was understood he would do, Deputy Bartlett reported those test results and Mr. Watson's behavior and admissions to representatives of Vancouver and its private investigation firm, Southern Research Company, Inc. (A. 12) Since Deputy Bartlett had no further interest in the matter and since Mr. Watson and his employer and its investigator desired to pursue private discussions concerning Mr. Watson's admissions they did so at a motel in DeRidder, Louisiana, immediately thereafter. (A. 12 and 14) The following day Mr. Watson was terminated because of the substantive admissions made to Deputy Bartlett and his employer, among other reasons. (A. 12)

Mr. Watson sought employment elsewhere in the timber industry and was offered positions by two businesses but refused them. (A. 12) The marital relationship between the Watsons was deteriorating during at least the last several months preceding Mr. Watson's suicide on May 12, 1980. (A. 15) Mrs. Watson actually filed a suit for divorce on the day of Mr. Watson's death. (A. 15)

SUMMARY OF ARGUMENT

Since the United States Constitution and this Court's jurisprudence make it clear that a complaining party must move for a directed verdict based on the sufficiency of the evidence, our Federal appellate courts would usurp the jury's function by considering a question of sufficiency without such a motion. Since petitioner made no such motion in the Trial Court, she has not established jurisdiction before this Court. Even assuming *arguendo* that jurisdiction has been established, petitioner did not properly create a question of law through her failure to move for a directed verdict based upon the insufficiency of the evidence by the defense and she should not be allowed to benefit from her failure to file such a motion.

REASONS FOR DENYING THE PETITION

(1) The motion for directed verdict is a prerequisite to raising the issue of sufficiency of the evidence to a question of law which is properly reviewable.

While petitioner's motive for failing to file a motion for directed verdict either at the close of her case or at the close of the evidence is unknown, it would appear from page 6 of her petition that the motion was considered to be a vain and "useless thing." Such a position by the petitioner can hardly be justified in light of the Constitution and the jurisprudence.

The Seventh Amendment to the United States Constitution guarantees trial by jury. Petitioner would have this Court ignore

that right to trial by jury through by-passing the necessity of a motion for directed verdict in keeping with Rule 50, F.R.Civ.P., 28 U.S.C. As noted in *Slocum* v. *New York L. Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed.2d 879 (1913), in summarizing previous jurisprudence involving motions for judgment on the evidence notwithstanding the verdict:

> "They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."

Ibid., 228 U.S. at pp. 387-388, 33 S.Ct. at p. 532, 57 L.Ed.2d at p. 890. It is clear that the effect of a ruling on a motion for directed verdict going to the sufficiency of the evidence is to raise a question of law. This Court's denial of a writ of error in *Treat Mfg. Co.* v. *Standard Steel & Iron Co.*, 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853 (1895), reflects that the plaintiff should have proceeded to the court of appeals to complain of the trial court's granting defendant's motion for directed verdict since that ruling involved a matter of law. Thus, the fundamental right to trial by jury must be and is preserved, but the plaintiff is afforded the right through the common law to have the appellate courts consider the sufficiency of the evidence only if it is converted into a question of law through a motion for directed verdict based upon that ground.

Even assuming *arguendo* that this Court entertains jurisdiction, the Fifth Circuit's opinion should not be disturbed. That Court in *Stokes* v. *Continental Assurance Company*, 242 F.2d 893 (5th Cir. 1957), *certiorari* denied, 355 U.S. 890, 78 S.Ct. 263, 2 L.Ed.2d 189 (1957), quoted *Boudreaux* v. *Mississippi Shipping Co., Inc.*, at p. 894 as follows:

> " '. . . (2) This court has never departed from but has consistently reaffirmed the rule governing in cases of this kind, as laid down in Baten v. Kirby Lumber Corp., 5 Cir., 103 F.2d 272, 274:
>
> " ' "Whether the verdict is authorized by the evidence is a question not reserved in the trial. The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U.S.C.A., . . ., does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient." ' "

As pointed out in 9 C.Wright and A.Miller, Federal Rules of Civil Procedure, Civil §2536, p. 593 (1971), our Courts of Appeals are in agreement that absent a specific motion for directed verdict which is renewed at the close of the evidence, the sufficiency of the evidence will not be reviewed. A good treatment of this subject is seen in *Minnehaha County, S.D.* v. *Kelley*, 150 F.2d 356 (8th Cir. 1945), at p. 359:

> "Failure to interpose a motion for a directed verdict at the close of all the testimony and secure a ruling thereon precludes defendant from questioning here the sufficiency of the evidence. Amendment 7 of the Constitution provides, among other things, that, 'The right of trial by jury shall be preserved, and no fact tried by a

> jury shall be other wise re-examined in any Court of the United States, than according to the rules of the common law.'
>
> "The only mode known to the common law to re-examine such facts was the granting of a new trial by the court where the issue was tried. Parsons v. Bedford, 3 Pet. 433,447, 7 L.Ed. 732; Thorn v. Browne, 8 Cir., 257 F. 519.
>
> "In law actions this court has appellate jurisdiction only and the only method of securing a review of the facts is by interposing a motion for a directed verdict at the close of all the evidence and securing a ruling thereon. This ruling presents a question of law."

The First Circuit was confronted with much the same argument as petitioner urges here in *Martinez Moll* v. *Levitt & Sons of Puerto Rico, Inc.*, 583 F.2d 565 (1st Cir. 1978). There the Court did not excuse the defendant's failure to file a motion for directed verdict based upon insufficiency of the evidence even though the trial judge had already denied such a motion of the plaintiff and the judge later made statements in ruling on a motion for judgment n.o.v. that the case was one for the jury's consideration. There the First Circuit stated at p. 569:

> "The purpose of the Rule 50(b) requirement is to alert the opposing party to the movant's claim of insufficiency before the case goes to the jury, so that his opponent may possibly cure any deficiency in his case should the motion have merit, and also so that the judge may rule on the adequacy of the evidence without impinging on the jury's fact-finding province. See Sullmeyer v. Coca Cola Co., supra at 846 n. 17; 5A Moore's Federal Practice ¶50.08 at 50-88 (1977). Defendant did nothing before verdict to alert either the plaintiffs or the court that it challenged the legal sufficiency of the evidence of intent. Plaintiffs' own motion

for directed verdict did not serve this purpose, nor could the court's denial of plaintiffs' motion constitute a ruling on whether or not there was sufficient evidence to go to the jury. Whether to direct a verdict for a plaintiff is an altogether different question from whether a plaintiff's evidence is strong enough to survive a defense motion. A verdict seldom is directed for a plaintiff even on very strong evidence. The purposes of Rule 50(b) would be subverted were one party's motion for directed verdict to serve as his opponent's release from the Rule's requirement."

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit should be denied and that the judgment be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was received by undersigned counsel on May 24, 1983, and I certify that a copy of the foregoing Brief in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon CHERYL SUE WATSON, by mailing three copies to her counsel of record, Mr. Drew Ranier, Baggett, McCall & Ranier, P. O. Box 1645, Lake Charles, Louisiana, 70601, VANCOUVER PLYWOOD CO., INC., ARTHUR DOUGHTY, GORDON McKAY, GLENN SALTER and TRAVELERS INDEMNITY COMPANY by mailing three copies to their counsel of record, Mr. J. L. Cox, Jr., P. O. Drawer EE, Lake Charles, Louisiana, 70602, and MIDLANDS INSURANCE COMPANY and SOUTHERN RESEARCH COMPANY by mailing three copies to its counsel of record, Mr. Frank M. Walker, Jr., P. O. Drawer 1705, Lake Charles, Louisiana, 70602, by United States Mail, postage prepaid and properly addressed.

DeRidder, Louisiana this 20th day of June, 1983.

DAVID R. LESTAGE
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Attorneys for Respondents,
JOE BARTLETT, JR., M. BOLIVAR BISHOP, THE NORTH RIVER INSURANCE COMPANY and INTERNATIONAL SURPLUS LINES INSURANCE COMPANY

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-3319
Summary Calendar

CHERYL SUE WATSON, as administratrix of the estate of Talbot E. Watson, individually, and on behalf of the minor, Jesse Lee Watson.

Plaintiff-Appellant,

versus

JOE BARTLETT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(February 22, 1983)

Before REAVLEY, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal is from a jury verdict in favor of the defendants. The case was brought under 42 U.S.C. §1983, alleging violation of Talbot Watson's civil rights by the defendants, Joe Bartlett, Jr., Deputy Sheriff of Beauregard Parish, Louisiana, Vancouver Plywood Company, Inc., and its employees, Arthur M. Doughty, Gordon McKay and Glenn Salter, and Southern Research Company.

Because we find that there was sufficient evidence to support the jury's findings at trial, and because we find that the district judge did not err in his admission of evidence, we affirm.

I.

Vancouver Plywood Company was engaged in timber and logging operations and in the fabrication of plywood in western Louisiana in the summer and fall of 1978. During this period, Vancouver received reports that one of its contractors, Mr. James Whitaker, was converting timber to his own use rather than delivering it to Vancouver's mills as required by the contract. In investigating the possible conversion, Vancouver hired Southern Research Company, a private firm, to investigate the suspected conversion.

In November 1978, Southern Research enlisted the assistance of the Beauregard Parish Sheriff's Department, and Mr. Whitaker was arrested. He gave oral and written statements to Southern Research indicating that conversion of timber had occurred. Among other information given by Mr. Whitaker was the complicity or knowledge of the conversion by Vancouver employees, including Mr. Talbot Watson, and Watson's supervisor, Rayburn McDaniel.

Vancouver Plywood Company decided that it wanted to administer polygraph tests to Watson and McDaniel and to Brent Wofford, who worked with Watson in McDaniel's department. The tests were administered by Deputy Sheriff Joe Bartlett, who had experience in administering polygraph examinations. Talbot Watson was given the polygraph examination on November 15, 1978, after Deputy Bartlett had obtained his permission to administer the test and had explained the procedures and apparatus to him. Deputy Bartlett told Mr. Watson that he would report the test results to Vancouver.

Bartlett used a polygraph technique known as "relevant-irrelevant" and relied primarily on breathing measurements to determine whether Watson was dissembling. Bartlett's interpretation of the test administered to Watson was that Watson was not implicated in the conversion of the timber but that

Watson was dissembling in some areas regarding his employment. After the test, Deputy Bartlett passed along the test results to Vancouver Plywood Company and indicated the fact that the test was inconclusive concerning the involvement or knowledge by Mr. Watson of the conversion, but that Mr. Watson had been evasive and that Mr. Watson had, in fact, admitted various business irregularities during the examination.

After the test, Watson agreed to go to a local hotel with officials from Vancouver Plywood Company and Southern Research Company to discuss the tests and to discuss Vancouver's concerns. The officials met with Mr. Watson for approximately three hours. The next day, November 16, 1978, Vancouver terminated Watson because of the substantive admissions which he had made to Deputy Bartlett and to the company.

Subsequent to his being fired from Vancouver Plywood Company, Mr. Watson sought employment elsewhere and received two job offers which he rejected. He continued his normal outside activities, including hunting and exercising. He began work on a timber-lumber related venture known as a "scrag" mill.

In July, 1979, Watson filed this lawsuit alleging that his civil rights had been violated in that his due process rights, equal protection rights, freedom from illegal search and seizure, rights against self-incrimination and right to counsel had been denied him. He alleged that he had been falsely arrested and imprisoned and that trespass, assault, intentional infliction of emotional distress and defamation of character had been committed against him.

Subsequent to the filing of the lawsuit, Watson committed suicide on May 12, 1980. His wife, Cheryl Watson, in her own and her minor son's account, carried the lawsuit forward, amending the complaint to add a claim for wrongful death, alleging that the appellee's actions caused Watson to commit suicide.

The jury found that Watson's civil rights had not been violated and that his death was not a result of the termination of employment by Vancouver Plywood Company. The court

below entered judgment on the jury's verdict. The appellant filed a timely motion for a new trial which was denied. Mrs. Watson thereafter filed a timely notice of appeal.

II.

There are essentially three issues presented on this appeal:

Whether there was evidence to support the jury's finding that Deputy Bartlett did not violate Talbot Watson's civil rights in the administration of the polygraph exam;

Whether there was evidence to support the jury's determinations that none of the appellees violated Watson's civil rights;

Whether the district judge erred in admitting the petition for divorce filed by Cheryl Watson's attorney on the date of Talbot Watson's suicide?

III.

The appellant argues that the jury's finding that Deputy Bartlett did not violate Watson's civil rights was not supported by the evidence.

The appellant failed to move for a Directed Verdict or for Judgment N.O.V. She did file a timely Motion for New Trial, which was denied.

This court has held that when a party fails to move for a Directed Verdict or for Judgment N.O.V. and subsequently appeals on the basis of insufficiency of the evidence, review is limited to "whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a "manifest miscarriage of justice." *Colletti v. Credit Bureau Services, Inc.*, 644 F.2d 1148, 1151 (5th Cir. 1981), *quoting Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). As recently stated in *Bunch v. Walter*, 673 F.2d 127, 130 n.4 (5th Cir. 1982), we are limited to an examination "only for *existence* of *any* evidence." We can reverse only upon a finding of an "absolute

absence" of evidence. *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 512 (5th Cir. 1980).

Nor does our review of the lower court's denial of the appellant's Motion for New Trial allow us to review the sufficiency of the evidence. We may determine only whether the court clearly abused its discretion. *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509, 511 (5th Cir. 1970). In making that determination, we again look only to see whether any evidence existed to support the jury's verdict. *Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 349 (5th Cir. 1981).

Extensive expert testimony was presented by the appellees to the jury to substantiate both the circumstances under which the polygraph test was given and the actual administration of the test. While significant testimony was presented by the appellant to dispute the accuracy of the test and the propriety of its administration, we are forced to conclude, under the limited scope of review afforded to us, that certainly *some* evidence was presented which would allow the jury to reach its verdict. It is not appropriate that we evaluate the sufficiency of the evidence or the weight which should have been ascribed to it by the jury. We are only to examine the testimony and evidence presented which supports the appellees' case and the jury's finding in the appellees' favor. Such evidence is manifest in the record, and we therefore cannot find that no evidence was presented upon which the jury could base its verdict.

This analysis applies as well as to the question of whether the appellees had violated Watson's civil rights by committing the torts of false arrest, intentional infliction of emotional distress, invasion of privacy or slander.

Testimony was presented that Watson consented both to the polygraph test and to the questioning at the local motel. Watson signed a form consenting to the test and admitted upon deposition that his consent was given willingly. Although Talbot Watson denied knowledge of the conversion scheme, he did indicate other irregularities.

In sum, evidence was presented which substantiated the jury's verdict. Watson took the test knowingly and voluntarily. He did not request an attorney. There was no physical restraint

nor were there any threats against Mr. Watson. The jury's verdict was supported by evidence.

The remaining issue concerns the admission of the divorce petition which Mrs. Watson had filed on the same day as Mr. Watson committed suicide, May 12, 1980.

Mrs. Watson filed a motion *in limine* to bar admission of the petition. After argument at pretrial conference, the district court judge denied that motion.

Based on FED R. EVID. 403, which allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," Mrs. Watson urges that the trial judge abused his discretion in admitting the divorce petition.

Mrs. Watson attempted to prove at trial that Talbot Watson committed suicide because of the events leading up to and including his termination by Vancouver Plywood Company. The appellees, on the other hand, attempted to prove that Talbot Watson committed suicide because of the deteriorating relationship between him and his wife.

We have held that the principal function of Rule 403 is to exclude matter whose relevance is scant or merely cumulative and whose introduction was sought apparently "for the sake of its prejudicial effect." *U.S. v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128 (1979). In viewing that relevance, our appellate function is to determine whether the lower court has abused its discretion in admitting or excluding evidence under Rule 403. *Ramos v. Liberty Mutual Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

Of course the divorce petition had a significant impact upon the jury. It was intended to have such an impact. It constituted an integral part of the appellees' case to refute the appellant's case. We cannot find that it was unfairly prejudicial or of such inflamatory or outrageous nature as to confuse or mislead the jury. We therefore cannot find that the district court abused its discretion in admitting the evidence.

For the foregoing reasons, we find that the district

court's entry of judgment upon the jury's verdict was proper and therefore affirm the judgment and the denial of the Motion for New Trial.

AFFIRMED